Supreme Court, U. S.
FILED
OCT 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78- 78-648

CITY OF SAN ANTONIO, Petitioner,

v.

SAN PEDRO NORTH, LTD., et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

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ATTORNEY FOR PETITIONER,
CITY OF SAN ANTONIO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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NO. 78-

****

CITY OF SAN ANTONIO, Petitioner,

v.

SAN PEDRO NORTH, LTD., et al., Respondents.

****

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS,
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

****

The petitioner City of San Antonio respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, at San Antonio, Texas, entered in this proceeding on January 25, 1978.

In addition to the respondent San Pedro North, Ltd., which is the actual party in controversy,

the following persons, who were parties in the proceeding in the court whose judgment is sought to be reviewed and who support the position of the petitioner, are named as respondents under Rule 21(4) of this court: Lila Cockrell, Richard Teniente, Glen Hartman, Ford Nielsen, Bob Billa, Henry Cisneros, Claude Black, Al Rohde, and Phil Pyndus. These additional respondents were members of the San Antonio city council when the lawsuit was filed in state court.

(All references to "the respondent" in this petition will refer only to San Pedro North, Ltd., unless otherwise indicated.)

OPINION BELOW

The opinion of the Texas Court of Civil Appeals is reported in 562 S.W.2d 260. (App. B)

The petitioner's application for discretionary review in the Supreme Court of Texas was refused, "no reversible error," without opinion. (App. E)

JURISDICTION

The judgment and opinion of the Texas Court of Civil Appeals was entered on January 25, 1978 (App. C, App. B), and petitioner's motion for rehearing was denied on March 1, 1978. (App. D)

The petitioner's application for discretionary review in the Supreme Court of Texas, by way of writ of error, was duly filed on March 29, 1978, and denied ("Refused, no reversible error") without opinion on May 31, 1978. (App. E) A timely motion for rehearing was denied on July 19, 1978. (App. E)

This petition for certiorari was filed within 90 days of that date.

This court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Review is sought of the judgment of the Texas Court of Civil Appeals, which, because the Texas Supreme Court refused to grant discretionary review, is the judgment reviewable under 28 U.S.C. §1257. [1]

---

1. Sullivan v. Texas, 207 U.S. 416, 28 S.Ct. 215, 217, 52 L.Ed. 274 (1908); American Railway Express Co. v. Levee, 263 U.S. 19, 20-21, 44 S.Ct. 11, 12, 68 L.Ed. 140 (1923); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 160, 74 S.Ct. 396, 397-398, 98 L.Ed. 583 (1954); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 678, n.1, 88 S.Ct. 1298, 1300, n.1, 20 L.Ed.2d 225 (1968).

QUESTIONS PRESENTED FOR REVIEW

1. Whether state court judgment that municipal zoning ordinance was not subject to referendum, on ground that referendum procedures of city charter were fatally inconsistent with general laws of the state, violated Tenth Amendment reservation of powers to the people?

2. Whether such state court judgment violated the Equal Protection, Due Process, or Privileges or Immunities Clause of the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The constitutional provisions, statutes, and ordinances involved in this case appear in the Appendix, as follows:

Amendments V, X, and XIV, Sec. 1, to the Constitution of the United States: Appendix F

Vernon's Ann.Tex.Const. art. 1, §§2, 29, and art. 11, §5: Appendix G

Vernon's Ann.Civ.St. arts. 1011, 1011a, 1011b, 1011d, 1011e, 1011f, 1165, 1175, and 1176: Appendix H

Charter of the City of San Antonio, Art. 1, Sec. 3, Par. 9, and Art. IV, Secs. 35, 39, 40, 41, and 43: Appendix I

STATEMENT OF THE CASE

The respondent, a real-estate developer, acquired a parcel of land lying outside the city limits of San Antonio in 1961. The land was annexed in 1972 by the city, the petitioner here, and automatically assigned a temporary zoning classification (Temp. R-1) as provided for in an applicable city ordinance. So long as the property retained its temporary zoning status, it could not be developed. In 1975, the respondent applied to the petitioner for permanent zoning. Thereafter, on October 16, 1976, following compliance with the zoning procedures of the San Antonio city charter--which in fact had simply adopted in toto the provisions of Vernon's Ann.Civ.St. arts. 1011 a-j, the state's zoning enabling act--the petitioner rezoned the tract with permanent classifications (R-1 B-2 and Perm. R-1) that permitted commercial development of the property.

The action of the city council ignited a political explosion in San Antonio. The property in question is situated directly over a subterranean geological formation known as an "aquifer recharge zone" which provides the city of San Antonio with its only source of drinking water. Concerned citizens' groups, alarmed over what they viewed as a genuine threat to their community's well-being--the pollution of the underground recharge zone by commercial development on the surface--immediately organized efforts to put the zoning ordinance to a vote of the people. Their vehicle to do this was a provision of the city charter authorizing a

referendum on "any ordinance passed by the council," except for several enumerated types not relevant here. (App. I)

Their efforts were ultimately successful. The necessary procedural steps accomplished, a referendum election was held on January 17, 1977, in which the voters of San Antonio rejected the zoning ordinance by the wide margin of 44,541 to 12, 407.

The respondent thereupon filed suit in the district court of Bexar County (San Antonio), Texas, seeking, inter alia, a declaratory judgment that the referendum was invalid. The trial court upheld the validity of the referendum, and the respondent appealed.

The Texas Court of Civil Appeals, whose judgment is here sought to be reviewed, reversed on the ground that a zoning ordinance was not subject to the referendum provisions of the city charter. (App. B) In essence, the court reasoned that the city charter's referendum provisions were inconsistent with its zoning provisions, which in turn meant that the referendum provisions were inconsistent with a general state law, inasmuch as the charter's zoning provisions were identical to, and indeed were an adoption of, the state's zoning enabling act. (App. I; App. H) Since there is a provision in the state constitution prohibiting any city charter or city ordinance to be inconsistent with a general state law (App. G), the charter's referendum provisions necessarily could not stand up against the zoning provisions.

The key passage in the opinion read:

> To give effect to the election in this case, assuming that the result of the election was not a repeal of the zoning ordinance previously passed by the municipal legislative body, would be to add a procedural step to zoning which is not required by the comprehensive provisions of the Enabling Act. A city can no more add a step to the procedures required by state law than it can omit one. City of San Antonio v. Lanier, 542 S.W.2d 232 (Tex.Civ.App.--San Antonio 1976, writ ref'd n.r.e.).
>
> (App. B)

I. Raising of the Federal Issue Below

The federal question sought to be reviewed was raised in the following manner:

Between the time the suit was filed in the state trial court on January 19, 1976, and the time it went to trial on January 10, 1977, this court handed down City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976), which likewise involved the submission of a zoning ordinance to referendum vote.

From that point forward in the state litigation, including the trial, the Eastlake decision and the theme of reserved powers of the people figured prominently in the legal arguments of the parties. The petitioner urged their applicability to the case at hand, the respondent resisted them.

Despite the proper and timely presentation of the federal issue, however, the Court of Civil Appeals refused to pass expressly on the question of reserved powers, and based its judgment instead on a point of state law. For this reason, and also because the Texas Supreme Court in denying discretionary review did so without written opinion, the petitioner has necessarily included in the Appendix excerpts from several of the briefs filed in the state proceedings to show that the federal issue was in fact duly raised. (App. J)

In Dewey v. Des Moines, 173 U.S. 193, 199, 19 S.Ct. 381, 43 L.Ed. 665 (1899), the court said:

> Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, * * * there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. 2

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2. See, also, State of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928); Lawrence v. State Tax Commission, 286 U.S. 276, 282, 52 S.Ct. 556, 558, 76 L.Ed. 1102 (1932).

II. The State Ground Was Neither Adequate Nor Independent

The state court invalidated the municipal referendum, which admittedly had been conducted in full compliance with the requirements of the city charter, as being a void attempt to circumvent the state's zoning enabling act, Vernon's Ann.Civ.St. arts. 1011 a-j (App. H), which posits exclusive procedures for the passage of zoning ordinances. What the court discerned as the fatal defect in the San Antonio referendum was, evidently, that the referendum itself constituted an added procedural step to those enumerated in the state enabling act.

The basic flaw in the reasoning of the court, aside from its refusal to consider the federal issue, is its underlying assumption that the mandatory procedures of the state enabling act must apply to a zoning referendum. The court totally failed to note the distinction between, on the one hand, a zoning referendum and, on the other, a zoning repeal, or a zoning amendment, or some other type of zoning change. It is to the last-named examples that the state zoning enabling act was clearly intended to apply.

An ordinance that repeals a zoning classification, or amends it, or otherwise changes it is regulating the use of the property involved, and is doing so in a direct manner. But an ordinance calling a zoning referendum does not purport to zone property or to regulate its use.

> Such a [referendum] statute is neutral, so far as the subject matter of the referendum is concerned, and merely provides a method for staying the effect of legislation, in this case zoning Ordinance No. 55.49-69, until the electorate has had an opportunity to either approve it or reject it.
>
> When * * * the electorate rejects the legislation the effect is, not to zone property or even to change the zoning of property, but merely to prevent the zoning ordinance as adopted by the City Council, from ever becoming effective. The property in question, being unaffected by the ordinance, remains, as far as zoning is concerned, either zoned or, if previously zoned, as in this case, then in the classification of the previous zoning * * *. Southern Alameda Sp. Speak. Org. v. City of Union City, 314 F.Supp. 967, 970 (D.C.Calif.1970), affirmed 424 F.2d 291 (9th Cir.1970).

The precedential weight of the two Texas opinions cited by the Court of Civil Appeals is not compelling. Bolton v. Sparks, 362 S.W.2d 946 (Tex.1962), did not involve a referendum. Hancock v. Rouse, 437 S.W.2d 1 (Tex.Civ.App. 1969, writ ref'd n.r.e.), was a mandamus action to compel a municipality to hold an initiative and a referendum election to propose new zoning as well as to delete a total of four existing zoning ordinances. The opinion discussed at length the need for compliance with the state zoning statutes as they apply to new zoning, or to zoning proposed by the initiative process.

Hancock did not reach, beyond dictum, any supportable decisions as to the referendum portion of the lawsuit.

The petitioner believes, therefore, that the ratio decidendi of the Court of Civil Appeals, wholly apart from any question of federal law, was not broad enough to sustain the judgment on state grounds. At the least, the federal issue of reserved powers was so interwoven with any issue of state law that one of them could not have been considered without the other.

REASONS FOR GRANTING THE WRIT

The decision below raises very important constitutional issues.

Although it is settled as a general principle that the regulation of municipalities is a matter peculiarly within the domain of the state, thereby precluding a city from invoking federal constitutional guarantees against the state, Newark v. New Jersey, 262 U.S. 192, 198, 43 S.Ct. 539, 67 L.Ed. 943 (1913), the rule is subject to exception when the rights of private citizens of the municipality are involved.[3]

---

3. For example, the doctrine of one-man, one-vote based on equal-protection guarantees under the Fourteenth Amendment places limits on state control of local governments. Municipal Corporation Law, Antieau, §2.04.

[footnote 3 continued on next page]

In the instant case, the power of the state of Texas to regulate the affairs of the city of San Antonio is in issue, and the federal constitutional rights of the citizens of the city are directly involved.

The constitutional nexus is the Tenth Amendment, which declares the reservation of power by the people unto themselves, and the instrument of its expression here was the referendum process, which itself has been referred to as a classic demonstration of devotion to democracy. James v. Valtierra, 402 U.S. 131, 137, 91 S.Ct. 1331, 1333, 28 L.Ed.2d 678 (1971). The operative constitutional guarantees are provided by the equal-protection, due-process, and privileges-or-immunities clauses of the Fourteenth Amendment.

The constitutional questions posed by the instant case are serious and deep, and justify a full examination by this court. "[T]here has been scant judicial consideration of the constitutionality of zoning procedures, as contrasted with a large number of judicial opinions on the constitutionality of substantive zoning acts." Comment, "The Initiative and Referendum's Use in Zoning," C. Oren, 64 Calif. L. Rev. 74, 79 (1976).

[footnote 3 continued from previous page]

Similarly, a state may not manipulate municipal boundary lines for the purpose of excluding black citizens from the franchise; this presents a Fifteenth Amendment issue. Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d ___ (1960).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Civil Appeals, Fourth Supreme Judicial of Texas.

Respectfully submitted,

WILLIAM HOLLIS ROBISON
501 Milam Building
San Antonio, Texas 78205

Counsel for Petitioner

October 16, 1978

APPENDIX

APPENDIX A

JUDGMENT OF THE TRIAL COURT,
January 18, 1977.

No. 76-CI-677

SAN PEDRO NORTH, LTD.

VS.

CITY OF SAN ANTONIO, ET AL.

IN THE DISTRICT COURT

45TH JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

JUDGMENT

On the 10th day of January, 1977, came on to be heard the above entitled and numbered cause. The parties waived trial by jury and the Court having considered the pleadings, testimony, evidence, and arguments of counsel, is of the opinion that judgment should be rendered in favor of Defendants.

It is therefore, ORDERED, ADJUDGED and DECREED that Plaintiff take nothing by this suit against Defendants and that costs of suit be taxed against Plaintiff.

To which judgment Plaintiff duly excepted and gave notice of appeal to the Court of Civil Appeals for the Fourth Supreme Judicial District sitting at San Antonio.

SIGNED and ENTERED this 18th day of January, 1977.

/s/ Robert R. Murray

JUDGE,45TH DISTRICT COURT

APPENDIX B

OPINION OF COURT OF CIVIL APPEALS,
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS
SAN ANTONIO, January 25, 1978

SAN PEDRO NORTH, LTD., Appellant,

v.

CITY OF SAN ANTONIO, et al., Appellees.

No. 15828

COURT OF CIVIL APPEALS,
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS
SAN ANTONIO

January 25, 1978

Rehearing Denied March 1, 1978.

Harvey L. Hardy, San Antonio, for appellant.

William H. Robison, George H. Spencer, Randolph P. Tower, Clemens, Spencer, Welmaker & Finck, San Antonio, for appellees.

CADENA, Chief Justice.

CHIEF JUSTICE CARLOS C. CADENA:

Plaintiff, San Pedro North, Ltd., a limited partnership, filed this suit seeking a declaration that an ordinance, initiated by petition of voters and adopted at an election, repealing an ordinance adopted by the City Council of the City of San Antonio permanently zoning land owned by plaintiff. Defendants are the City of San Antonio and the members of its legislative body.

Plaintiff appeals from a judgment denying it the relief prayed for.

Plaintiff, engaged in the development of land, purchased the land in question in 1961. The land was annexed by the City in 1972, and under applicable ordinances the land immediately became zoned "Temporary R-1, One Family Residence District."

The City Code contemplates that after land has been annexed the City Planning Commission shall, on its own motion and as soon as practicable, assign appropriate "permanent" zoning classification to newly annexed land. The City Planning Commission did not see fit to initiate appropriate zoning proceedings for the land in question.

Plaintiff conveyed portions of the land in question and in 1975 the buyer successfully initiated proceedings to have the land purchased from plaintiff permanently zoned B-2 and B-3.

Subsequently, in the summer of 1975, plaintiff requested that his land be permanently zoned. The Planning Commission recommended that a portion of the land be permanently zoned B-2 and that the remainder be permanently zoned R-1.

On October 16, 1975, City's governing body adopted an ordinance assigning to plaintiff's land the permanent zoning classifications recommended by the City Planning Commission.

After the enactment of the October 16 ordinance, citizens' groups circulated petitions to repeal such ordinance and thus, in effect, to cause plaintiff's land to revert to its original temporary zoning.

On December 11, 1975, City's governing body certified the petitions as sufficient and, after a motion to repeal the October 16 ordinance was defeated, called an election for January 17, 1976, for the purpose of submitting the proposed repealing ordinance to the voters. At the election held on January 17, 1976, the vote was in favor of the repeal of the ordinance of October 16, 1975. The election results were canvassed by City's governing body and the result officially declared on January 19, 1976.

Article IV, § 35 of City's charter provides that the voters shall have the power to approve or reject at the polls "any ordinance passed by the council save one appropriating money, levying taxes, or fixing utility rates, or any ordinance submitted by the council of its own itiative to a vote of the electors." This section provides that "Within forty days after the enactment by the council of any ordinance which is subject to a referendum, a petition signed by qualified electors of a [sic] city equal in number to at least ten per cent of the electors qualified to vote at the last preceding regular election may be filed with the city clerk requesting that any such ordinance be either repealed or submitted to a vote of the electors."

Clearly, the above charter provision contains no language excluding zoning ordinances from its provisions.

Article I, § 3, Para. 9 of the Charter grants the power to the Council to regulate the zoning and use of land expressly adopts the State Zoning Enabling Act (Articles 1011a to 1011j, TEX. REV. CIV. STAT. ANN. (1963)).

Plaintiff contends that a zoning ordinance is not subject to the initiative and referendum provisions of City's charter. We agree.

At all times pertinent to this litigation, the power of Texas cities to zone was governed by the provisions of Articles 1011a - 1011m, TEX. REV. CIV. STAT. ANN. Pertinent provisions require a public hearing, following notice of at least 15 days, before regulations may be adopted or amended. Articles 1011d, 1011e.

Article 1011f requires the appointment of a Planning Commission to recommend the boundaries of the various zoning districts, and provides that the municipal legislative body shall take no action until it has received the final report of the Commission. This statute also requires written notice of all hearings before the Zoning Commission "on proposed changes."

There are no constitutional or statutory provisions relating to initiative and referendum, except for isolated statutory provisions for referendum with respect to certain subjects not here relevant. The Zoning Enabling Act contains no such provisions.

In Hancock v. Rouse, 437 S.W.2d 1, 4 (Tex. Civ.App.--Houston [1st Dist.] 1969, writ ref'd

n.r.e.), the Court said:

> A zoning ordinance enacted by the City Council without the notice and hearing required by statute would be invalid and the power of the people to legislate directly is subject to the same limitations. ... Since notice and hearing are clearly required by the ... general law of the State, as a prerequisite to the enactment of Zoning Ordinances, and since notice and hearing have no place in the process of legislating through initiative and referendum, the power of the people ... to legislate directly does not extend to the subject of zoning.

In Bolton v. Sparks, 362 S.W.2d 946, 950 (Tex. 1962), it was recognized that zoning ordinances and amendments to such ordinances are invalid where the mandatory provisions of the statutes concerning notice and hearing have been ignored, saying that the requirement of notice and hearing are intended for the protection of property owners against arbitrary action and that compliance with the mandatory provisions of the statutes is essential to the exercise of jurisdiction by municipal governing bodies and each act must be performed.

To give effect to the election in this case, assuming that the result of the election was not a repeal of the zoning ordinance previously passed by the municipal legislative body, would be to add a precedural step to zoning which is not required by the comprehensive provisions of the Enabling Act. A city can no more add a step to the procedures required by state law than it can omit one. City of San Antonio v. Lanier,

542 S.W.2d 232 (Tex.Civ.App.--San Antonio 1976, writ ref'd n.r.e.).

Our conclusion finds support in decisions from other jurisdictions. Forman v. Eagle Thrifty Drugs and Markets, 89 Nev. 378, 516 P. 2d 1234 (1973); Hurst v. City of Burlingame, 207 Cal. 134, 277 P. 308 (1929); cf. Township of Sparta v. Pillane, 125 N.J. Super. 519, 312 A.2d 154 (1973), where the decision that zoning ordinances are not subject to the initiative and referendum process was based on the necessity for continuity and expertise in zoning, rather than on the statutory requirements for notice and hearing. San Diego Building Contractors Ass'n. v. City of San Diego, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), is not in conflict with the conclusion we have reached, since in that case there was not statutory requirement of notice and hearing and the court was merely considering whether the constitutional requirements of due process were in themselves sufficient to invalidate the adoption of zoning ordinances without notice and hearing. The same is true of City of Fort Collins v. Dooney, 178 Colo. 25, 496 P.2d 316 (1972), where the court concluded that the election campaign was sufficient notice and hearing insofar as the requirements of due process are concerned.

The judgment of the trial court is reversed and judgment is here rendered declaring that the election held on January 17, 1976 did not affect the validity of Ordinance No. 45863 adopted by the City Council of the City of San Antonio on October 16, 1975, and that such Ordinance No. 45863, assigning permanent zoning classification to plaintiff's land, is in full force and effect.

(MURRAY, J., did not participate in the disposition of this case.)

APPENDIX C

JUDGMENT OF THE FOURTH COURT OF CIVIL APPEALS
Wednesday, January 25, 1978

No. 15828

SAN PEDRO NORTH, LTD., Appellant

v.

CITY OF SAN ANTONIO et al., Appellees

APPEAL FROM THE 45TH DISTRICT
COURT OF BEXAR COUNTY.

This cause came on to be heard on the transcript of the record, and the same being examined, it is the opinion of the Court that there was error in the judgment of the court below in holding that the election held on January 17, 1976 had the effect of repealing Ordinance 45863. It is therefore considered, adjudged and ordered that said judgment of the trial court is reversed and judgment here rendered declaring that the election held on January 17, 1976 did not affect the validity of Ordinance 45863 adopted by the City Council of the City of San Antonio on October 16, 1975, and that such Ordinance No. 45863, assigning permanent zoning classification to plaintiff's land is in full force and effect.

It is further ordered that appellee, The City of San Antonio and the members of its legislative body pay all costs of appeal of this Court and the trial court in this behalf expended and incurred, and this decision be certified below for observance.

APPENDIX D

NOTICE OF ORDER OVERRULING
MOTION FOR REHEARING
COURT OF CIVIL APPEALS
FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

COURT OF CIVIL APPEALS

500 Bexar County Court House

San Antonio, Texas 78205

March 1, 1978

This is to inform you that in the Cause No. 15828, San Pedro North, Ltd, Appellant vs. City of San Antonio et al., Appellees, the Honorable Court of Civil Appeals today rendered judgment overruling Appellees City of San Antonio et al's motion for rehearing heretofore filed in said cause.

MARGARET J. REAVES
Clerk

APPENDIX E

ORDER REFUSING APPLICATION FOR
WRITS OF ERROR, May 31, 1978

And

ORDER OVERRULING MOTIONS
FOR REHEARING, July 19, 1978

IN THE SUPREME COURT OF TEXAS

May 31, 1978

No. B-7514

CITY OF SAN ANTONIO ET AL

VS.

SAN PEDRO NORTH, LTD.

FROM BEXAR COUNTY, FOURTH DISTRICT

Application on behalf of City of San Antonio et al. and application on behalf of Lila Cockrell et al., for writs of error to the Court of Civil Appeals for the Fourth Supreme Judicial District having been duly considered, and the Court having determined that the applications present no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said applications be, and hereby are, refused.

It is further ordered that applicants, City of San Antonio et al., and applicant, Lila Cockrell et al., each pay all costs incurred on their respective application.

July 19, 1978

No. B-7514

CITY OF SAN ANTONIO ET AL

VS.

SAN PEDRO NORTH, LTD.

FROM BEXAR COUNTY, FOURTH DISTRICT

Motion for rehearing of application for writ of error on behalf of Lila Cockrell, together with motion for rehearing on behalf of City of San Antonio having been duly considered, it is ordered that said motions be, and hereby are, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appear of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 7th day of September, 1978.

GARSON R. JACKSON, Clerk

By /s/ Judith E. Sullivan
Deputy

APPENDIX F

UNITED STATES CONSTITUTIONAL PROVISIONS

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV., Sec. 1.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

STATE OF TEXAS CONSTITUTIONAL PROVISIONS

Vernon's Ann.Tex.Const. art. 1, § 2

§ 2. Inherent political power; republican form of government

Sec. 2. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

Vernon's Ann.Tex.Const. art. 1, § 29

§ 29. Provisions of Bill of Rights excepted from powers of government; to forever remain inviolate

Sec. 29. To guard against transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.

Vernon's Ann.Tex.Const. art. 11, § 5

§ 5. Cities of 5000 or more population; adoption or amendment of charters; taxes; debt restrictions

Sec. 5. Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State * * *.

APPENDIX H

STATE OF TEXAS STATUTORY PROVISIONS

Vernon's Ann.Civ.St. art. 1011

Art. 1011. [817] [464] [418] Powers

The City Council, or other governing body shall have power to pass, publish, amend or repeal all ordinances, rules and police regulations, not contrary to the Constitution of this State, for the good government, peace and order of the City and the trade and commerce thereof, that may be necessary or proper to carry into effect the powers vested by this title in the corporation, the city government or in any department or office thereof; to enforce the observance of all such rules, ordinances and police regulations, and to punish violations thereof. No fine or penalty shall exceed Two Hundred Dollars ($200). Acts 1875, p. 113; G.L. vol. 8, p. 485; Acts 1949, 51st Leg., p. 367, ch. 190, § 1.

Vernon's Ann.Civ.St. art. 1011a

Art. 1011a. Grant of power for zoning

For the purpose of promoting health, safety, morals, and for the protection and preservation of places and areas of historical and cultural importance and significance, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings, and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the

density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purpose; and, in the case of designated places and areas of historic and cultural importance, to regulate and restrict the construction, alteration, reconstruction, or razing of buildings and other structures. Act. 1927, 40th Leg., p. 424, ch. 283, § 1; Acts 1959, 56th Leg., p. 883, ch. 406, § 1.

Vernon's Ann.Civ.St. art. 1011b

Art. 1011b. Districts

For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this Act;[1] and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts. Acts 1927, 40th Leg., p. 424, ch. 283, § 2.

Vernon's Ann.Civ.St. art. 1011d

Art. 1011d. Method of procedure

The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation,

restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such municipality. Acts 1927, 40th Leg., p. 424, ch. 283, § 4.

Vernon's Ann.Civ.St. art. 1011e

Art. 1011e. Changes

Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. In case, however, of a written protest against such change, signed by the owners of 20 per cent or more either of the area of the lots or land included in such proposed change, or of the lots or land immediately adjoining the same and extending 200 feet therefrom, such amendment shall not become effective except by the favorable vote of three-fourths of all members of the legislative body of such municipality. The provisions of the previous section relative to public hearing and official notice shall apply equally to all changes or amendments. Amended by Acts 1971, 62nd Leg., p. 2864, ch. 942, § 1, eff. June 15, 1971.

Vernon's Ann.Civ.St. art. 1011f

Art. 1011f. Zoning commission

In order to avail itself of the powers conferred by this Act,[1] such legislative body shall appoint a commission, to be known as the Zoning Commission, to recommend the boundaries of the

various original districts and appropriate regulations to be enforced therein. Such Commission shall make a preliminary report and hold public hearings thereon before submitting its final report, and such legislative body shall not hold its public hearings or take action until it has received the final report of such Commission; provided, however, that any city or town, by ordinance, may provide for the holding of any public hearing of the legislative body, after published notice required by Section 4 of this Act,[2] jointly with any public hearing required to be held by the Zoning Commission, but such legislative body shall not take action until it has received the final report of such Zoning Commission. Where a City Plan Commission already exists, it may be appointed as the Zoning Commission. Written notice of all public hearings before the Zoning Commission on proposed changes in classification shall be sent to owners of real property lying within two hundred (200) feet of the property on which the change in classification is proposed, such notice to be given, not less than ten (10) days before the date set for hearing, to all such owners who have rendered their said property for city taxes as the ownership appears on the last approved city tax roll. Such notice may be served by depositing the same, properly addressed and postage paid, in the city post office. Where property lying within two hundred (200) feet of the property proposed to be changed is located in territory which was annexed to the city after the final date for making the renditions which are included on the last approved city tax roll, notice to such owners shall be given by publication in the manner provided in Section 4 of this Act. Acts 1927, 40th Leg., p. 424, ch. 283, § 6; Acts 1949, 51st Leg., p. 205, ch. 111, § 1; Acts 1953, 53rd Leg., p. 732, ch. 287, § 1; Acts 1961, 57th Leg., p. 570, ch. 267, § 1.

Vernon's Ann.Civ.St. art. 1165

Art. 1165. May change charter

Cities having more than five thousand inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature. No charter or any ordinances passed under said charter shall contain any provision inconsistent with the Constitution or general laws of this State * * *. Acts 1913, p. 307.

Vernon's Ann.Civ.St. art. 1175

Art. 1175. Enumerated powers

Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty:

* * *

26. To divide the city in zones or districts, and to regulate the location, size, height, bulk and use of buildings within such zones or districts or otherwise, and make different regulations for different districts and thereafter alter the same. The governing authorities may be authorized by their charter to create a commission or board for the purpose of carrying out the powers of this section, or may provide for the creation of a board of appeals or review for the purpose of hearing and deciding on appeals from and reviewing any order, requirement, decision or determination of the governing authorities in carrying out the

powers and authority herein conferred; provided the authority and power herein conferred shall never be construed to be a limitation of any other power and authority conferred in this chapter.

* * *

Vernon's Ann.Civ.St. art. 1176

Art. 1176. Further powers

The enumeration of powers hereinabove made shall never be construed to preclude, by implication or otherwise, any such city from exercising the powers incident to the enjoyment of local self-government, provided that such powers shall not be inhibited by the State Constitution. Acts 1913, p. 307.

APPENDIX I

CITY OF SAN ANTONIO CHARTER PROVISIONS

Art. I, Sec. 3, Par. 9

Sec. 3. Powers of City.

* * *

Par. 9. Zoning. For the puropse [purpose] of promoting the health, safety, morals or general welfare of the city, the council may by ordinance regulate the location, height, bulk and size of buildings and other structures, the size of yards, courts and other open spaces, and the use of buildings, structures and land for trade, industry, business, residence or other purposes. Such ordinances may provide that the zoning board of appeals may, in appropriate cases and subject to appropriate principles, standards, rules, conditions and safeguards set forth in the ordinance, make special exceptions to the terms of the zoning regulations in harmony with their general purpose and intent. Such ordinances may provide that the zoning board of appeals may authorize variances from the strict application of the regulations in such cases and subject to such limitations as may be set forth in ordinance. All of the powers granted by Title 28, Chapter 4. Articles 1011A to 1011J, both inclusive, of the 1925 Revised Civil Statutes of Texas, as amended, together with all amendments now existing or hereafter enacted, are hereby adopted.

* * *

Art. IV, Sec. 35

Sec. 35. Power of referendum.

The electors shall have power to approve or reject at the polls any ordinance passed by the council save one appropriating money, levying taxes, or fixing public utility rates, or any ordinance submitted by the council of its own initiative to a vote of the electors; provided, however, that the foregoing limitation on ordinances subject to a referendum shall not apply to any ordinances enacted pursuant to the provisions or Article I, Section 3, Paragraph 12 of this Charter. Ordinances submitted to the council by initiative petition and passed by the council shall be subject to the referendum in the same manner as other ordinances. Within forty days after the enactment by the council of any ordinance which is subject to a referendum, a petition signed by qualified electors of the city equal in number to at least ten per cent of the electors qualified to vote at the last preceding regular municipal election may be filed with the city clerk requesting that any such ordinance be either repealed or submitted to a vote of the electors.
* * *.

Art. IV, Sec. 39

Sec. 39. Effect of certification on referendum petition.

When a referendum petition, or amended petition, has been certified as sufficient, the ordinance specified in the petition shall not go into effect, or further action thereunder shall be suspended if it be in effect, until and unless approved by the electors.

Art. IV, Sec. 40

Sec. 40. Consideration by council.

Whenever the council receives a petition from the city clerk, it shall be immediately considered. A proposed initiative ordinance shall be read and provision shall be made for a public hearing. The council shall take final action on the ordinance not later than sixty days after the date on which such ordinance was submitted to the council by the city clerk. A referred ordinance shall be reconsidered and the council shall, within thirty days, vote upon the question, "Shall the ordinance be repealed?"

Art. IV, Sec. 41

Sec. 41. Submission to electors.

If the council shall fail to pass an ordinance proposed by initiative petition, or shall pass it in a form different from that set forth in the petition therefor, or if the council fail to repeal a referred ordinance, the proposed or referred ordinance shall be submitted to the electors at a special or regular municipal election not less than thirty nor more than ninety days from the date the council takes its final vote thereon.

Art. IV, Sec. 43

Sec. 43. Results of election.

If a majority of the electors voting on a proposed initiative ordinance shall vote in favor thereof, it shall thereupon be an ordinance of the

city. A referred ordinance which is not approved by a majority of the electors voting thereon shall thereupon be deemed repealed. If conflicting ordinances are approved by the electors at the same election, the one receiving the greatest number of affirmative votes shall prevail to the extent of such conflict.

APPENDIX J

EXCERPTS FROM STATE-COURT BRIEFS
SHOWING PROPER PRESENTATION OF FEDERAL ISSUE

Appellant's Brief,
Texas Court of Civil Appeals

Filed March 7, 1977

* * *

(p. 18) City will, no doubt, place their main reliance on the case of City of Eastlake, et al. v. Forest City Enterprises, Inc., 49 L.Ed 2d 132, 96 S.Ct. 2358, decided by the U.S. Supreme Court in June, 1976.

This case upheld the constitutionality (under the U.S. Constitution only) of a charter provision which required a mandatory referendum to approve zoning amendments.

Eastlake is distinguishable from our case in many important respects. Most important, however, is the fact that the decision turned primarily (with three judges dissenting) on the fact that the "referendum rezoning decision" was reserved to the people under the Ohio Constitution.

* * *

Brief For Appellee, City of San Antonio,
Texas Court of Civil Appeals

Filed April 1, 1977

* * *

(p. 9) Appellant avers that if the power of referendum exists in the people at all, it does not extend to zoning matters. After this cause was filed, but before the trial was held, the United States Supreme Court rendered a landmark and decision opinion that goes to the heart of the dispute before this Court; City of Eastlake v. Forest City Enterprises * * * .

* * *

(p. 10) The United States Supreme Court further stated in its Eastlake opinion:

> "In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature. Hunter v. Erickson, 393 U.S. 385, 392, 21 L.Ed. 616, 89 S.Ct. 557, 47 Ohio Ops. 2d 100(1969)."

It is submitted that the framers of the Charter of the City of San Antonio did exactly this with the referendum clause in the City Charter. * * *

* * *

(p. 13) The Texas Supreme Court in the case of Taxpayers' Association of Harris County v. City of Houston, 129 Tex. 627, 105 S,W,2d 655, 657, said:

> "The power of initiative and referendum ... is the exercise by the people of a power reserved to them, and not the exercise of a right

> granted ..." and that "... in order to protect the people of the City in the exercise of their reserved legislative power, such Charter provision should be liberally construed in favor of the power reserved."

The Texas Supreme Court's expressions of 1937 would be most compatible to the United States Supreme Court's language in the landmark decision, City of Eastlake v. Forest City Enterprises, Inc. * * * We submit that referendum power is a present, viable and democratic right held by the people of Texas.

* * *

(p. 21) Zoning ordinances are not excluded from the referendum process by the City Charter, general laws, the Constitution of Texas or the United States Constitution.

* * *

Brief For Appellees, Lila Cockrell, Et Al.,
Texas Court of Civil Appeals

Filed March 31, 1977

* * *

(p. 17) The Charter of the City of San Antonio clearly and unmistakably reserves to the people the right of referendum in zoning matters, since it expressly applies to "any ordinances," with four stated exceptions that do not include zoning. As (p. 18) correctly determined by the United States Supreme Court's landmark decision in Eastlake v. Forest City Enterprises, Inc.,

this fundamental right of referendum is a veto power and a logical and proper extension of zoning procedures conducted in accordance with State zoning laws as adopted by the City Charter. * * * This is a classic case for the people's right of referendum - a vital and basic right which has been significantly strengthened and affirmed by the recent Eastlake decision of the United States Supreme Court.
* * *

* * *

Appellant's Reply Brief,
Texas Court of Civil Appeals

Filed April 25, 1977

* * *

(p. 16) We met the issue of Eastlake head on in our original brief * * * knowing full well that City would cling to this case for dear life because of the absence of any other authority upon which they could rely. We distinguished this case then and neither City nor Council have refuted that portion of our brief in any way. Without even attempting to meet our arguments in this regard they blindly rely on the generalities of that case * * * without even making a pretense of reconciling the constitutional, statutory, charter and factual differences between that case and our case. * * *

* * *

Supplemental Reply Brief of Appellant,
Texas Court of Civil Appeals

Filed May 17, 1977

* * *

(p. 3) In "Reply Brief of Appellant," * * * we listed six separate ways in which the case of City of Eastlake, et al. v. Forest City Enterprises, Inc. * * * (on which Appellees so heavily rely) is to be distinguished from this case. * * * We think the opinions of the Ohio Supreme Court and of the U.S. Supreme Court in Eastlake make these distinctions very clear. However, because of the almost total reliance of appellees on this case we now think it advisable to completely lay the Eastlake ghost to rest by citing chapter and verse as far as the Ohio constitution, statutes and case law are concerned. * * *

* * *

Motion For Rehearing By Appellee,
City of San Antonio,
Texas Court of Civil Appeals

Filed February 9, 1978

* * *

(p. 5) It is urged that no Texas appellate court has written on the singular question of whether a zoning ordinance is referable to (p. 6) the electors for approval or rejection as was done in the case at hand. The Supreme Court of the United States spoke very clearly to the question in 1976 in City of Eastlake v. Forest

City Enterprises, ___U.S.___, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976). There, the court held that the Ohio Supreme Court had erred in holding invalid a city charter amendment permitting voters to decide whether a zoning ordinance could be altered through the referendum process. In its opinion, 96 S.Ct. at 2364, the court quoted from Southern Alameda Spanish Speaking Organization v. City of Union City, California, 424 F.2d 291, 294 (9th Cir. 1970):

> A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters - an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest.

While the views of the Texas courts remains unwritten as to the application of the referendum process to zoning, we do find a clear expression that the process generally is a well-recognized right when it is reserved by the citizens in their city charter. * * *

* * *

Motion For Rehearing By Appellees,
Lila Cockrell, Et Al.,
Texas Court of Civil Appeals

Filed February 8, 1978

* * *

(p. 5) Maryland's highest court has recently held in Anne Arundel County v. McDonough, 354 A.2d 788 (1976), that the subject of zoning has not been pre-empted by zoning enabling statutes and, therefore, a zoning ordinance may come within the referendum power. The Maryland court also states a basic principle which is strongly reiterated by the United States Supreme Court in City of Eastlake v. Forest City Enterprises * * * which is that a referendum is a reservation and not a delegation of legislative power. It is this reservation of power which is included in the referendum provision of the City Charter (of San Antonio).

* * *

Application For Writ of Error
By Lila Cockrell, Et Al.,
Supreme Court of Texas

Filed March 30, 1978

* * *

(p. 14) The referendum, according to the United States (p. 15) Supreme Court in City of Eastlake v. Forest City Enterprises * * * "is a means for direct political participation, allowing the people the final decision, amounting to a veto power over enactments of representative bodies." It is this veto power which the voters of San Antonio exercised in the referendum election held January 17, 1976, and it is this right to a veto power which the voters reserved to themselves in Sec. 35 of the City Charter.
* * *

* * *

(p. 16) Unfortunately, up to this time, the Texas Courts of Civil Appeals in the Hancock case and in the instant case have run roughshod over (p. 17) what has been recently described by Chief Justice Burger of the United States Supreme Court in the Eastlake decision, as "a basic instrument of democratic government" - the referendum. Such cavalier disregard of so basic a part of the democratic process is unwarranted.

* * *

Application For Writ of Error
By City of San Antonio,
Supreme Court of Texas

Filed March 29, 1978

* * *

(p. 7) After this cause was filed, but before the matter reached trial, the United States Supreme Court rendered a decisive opinion in construing a zoning referendum clause in a municipal charter, City of Eastlake v. Forest City Enterprises, ___U.S.___, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976). * * * The Court upheld the referendum clause, commenting : " * * * The referendum, similarly, is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to give citizens a voice on questions of public policy. James v. Valtierra * * *."

* * *

Motion For Rehearing of Application For Writ of Error by Appellee City of San Antonio, Supreme Court of Texas

Filed June 15, 1978

* * *

(p. 5) * * * The question of whether zoning enactments of a municipality could be reviewed under the referendum provisions of a municipal charter has been laid to rest by the United States Supreme Court in City of Eastlake v. Forrest City Enterprises, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed. 2d (1976). The Eastlake case not only answered the specific questions in the case at hand, it is the most recent expression on the subject having been handed down after this cause was filed but before the trial was held. The Court of Civil Appeals did not refer to Eastlake in its opinion nor did it attempt to distinguish it from the subject case. It is submitted that the Eastlake decision is squarely in point with the case before the Court and has effectively vacated the holding in Hancock v. Rouse, 437 S.W. 2d 1, 4 (Tex. Civ. App. - Houston [1st Dist.] 1969, writ ref'd. n.r.e.). The Eastlake opinion traces the source of the referendum process (96 S.Ct. 2358 at 2361): "The conclusion that Eastlake's procedure violates federal constitutional guarantees rests upon the proposition that a zoning referendum involves (p. 6) a delegation of legislative power. A referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions all power derives from the people, who can delegate it to representative instruments which they create." (emphasis added).

* * *

(p. 10) * * * The citizens' right of referendum, as provided in the City Charter of San Antonio, became operative only after the City Council concluded its delegated duties and adopted the zoning change. It was at this point that the people exercised their "veto power over representative bodies," as discussed in the Eastlake case, supra.

* * *

(p. 11) * * * If the Court of Civil Appeals' decision is allowed to stand, with its holding that the legislature of Texas by enacting Articles 1011a through 1011m, Tex. Rev. Civ. Stat. Ann. has by implication denied the reserved right of referendum preserved in the home rule charter of the City of San Antonio, then the citizens of San Antonio as a class have been denied a right and privilege recognized even by the drafters of the United States Constitution as well as the Constitution of Texas. The United States Supreme Court in the Eastlake decision refers to Federalist Papers No. 39 (at p. 137) to support its holding that the right of referendum is a reserved right in the people rather than a delegated power from the government. * * *.

* * *

(p. 12) * * * If allowed to stand the Court of Civil Appeals' decision that the right of referendum as contained in the Charter of the City of San Antonio is denied by implication in Articles 1011a through 1011m (Tex. Rev. Civ. Stat. Ann.), then Petitioner must, on behalf of its citizens, urge that such statutes and the Court's interpretation thereof is violative of such citizens' rights under Amendment Ten of the Constitution of the United States, which states:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." Further, such statutes and interpretation thereof are (p. 13) violative of the rights of the citizens of San Antonio under the Fourteenth Amendment to the Constitution of the United States which states in part: " * * * No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." Further, such statutes and interpretation thereof are violative of such citizens' rights under the First and Fifth Amendments to the Constitution of the United States insofar as such amendments may apply. * * *.

* * *

Supreme Court, U. S.
FILED
NOV 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-648

CITY OF SAN ANTONIO,
Petitioner,

VS.

SAN PEDRO NORTH, LTD., et al.
Respondents.

Opposition To Petition For Writ Of Certiorari

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San Antonio, Texas 78213

Counsel For Respondent,
San Pedro North, Ltd.

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IN THE

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OCTOBER TERM, 1978

No. 78-648

CITY OF SAN ANTONIO,
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VS.

SAN PEDRO NORTH, LTD., et al.
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, San Pedro North, Ltd., files this Opposition to the Petition for a Writ of Certiorari to the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, and prays that such writ be denied.

JURISDICTION

Pretitioner claims jurisdiction under 28 U.S.C., Sec. 1257(3).

Such jurisdiction does not exist because Petitioner did not raise a Federal question in the State courts at any level.

At the trial court level Petitioner, as defendant, filed only a general denial (Appendix A hereto) and did not present any testimony, or other evidence at the trial.

At the intermediate appellate level Petitioner, as Appellee, filed counterpoints which did not raise a Federal question (Appendix B hereto.) The same is true of its assignments of error in its motion for rehearing filed in the same court (Appendix C hereto).

At the Texas Supreme Court level petitioner, in its

application for a writ of error, filed points of error which did not raise a Federal question (Appendix D hereto). The same is true of its points of error in its motion for rehearing filed in the same court (Appendix E hereto).

Petitioner attempts to rely for its Federal question on the fact that it cited and argued the case of **City of Eastlake v. Forest City Enterprises, Inc.,** 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976) in its briefs in the Court of Civil Appeals and in the Texas Supreme Court. (Petition, pp. 7-8).

To begin with, the City does not even pretend the so called Federal question that it claims it has raised was raised in its own behalf but rather in behalf of its "citizens." Petition, p. 12. No citizen is a party to this suit. Only a party whose Federal right has been denied is entitled to a writ of error to review final judgment of state court. **McNultee v. Lockridge,** (1899) 141 U.S. 327, 35 L.Ed. 796, 12 S.Ct. 11. The City does not seek any relief in its own behalf as a corporate entity.

Furthermore, the attention of the state court must be directed to the particular section of the Federal Constitution or statute on which reliance is placed and the challenge should be distinct and substantial. **Maxwell v. Newbold,** 18 How. 511, 15 L.Ed. 506; **House v. Road Improvement District No. 2,** 266 U.S. 175, 69 L.Ed. 229, 45 S.Ct. 60. Petitioner did not cite or invoke any Federal constitutional provision at any stage of this case to any extent until it did so, as an afterthought, in its motion for rehearing, Texas Supreme Court (Appendix F hereto). It will be noted that such constitutional provisions are invoked solely in behalf of its citizens and not of itself.

There is, of course, no dispute as to the fact that the state courts did not consider and decide the alleged Federal question.

Petitioner could not, in any event, raise such point for the first time at the Texas Supreme Court level. That Court only considers (on application for writ of error) points raised in the motion for rehearing in the Court of Civil Appeals. Rule 469(e), Texas Rules of Civil Procedure (Appendix G hereto). (See Appendix C, motion in Court of Civil Appeals.) In the case of **Rooker v. Fidelity Trust Company,** 261 U.S. 114, 67 L.Ed. 556, 43 S.Ct. 288, it was held that if "All that appears is that, after a judgment of affirmance, the plaintiffs sought to raise the question by a petition for rehearing, which was denied without opinion. But that effort came too late." (Citing authority.) "Federal questions, like others, should be presented in an orderly way before judgment." (Citing authority.)

That is, in every essential respect, the exact situation here.

The record in this case demonstrates that Petitioner has wholly failed to meet the jurisdictional requirements of the U.S. Supreme Court for a writ of certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

STATEMENT OF THE CASE

Petitioner's "Statement of the Case," while essentially correct, contains some omissions and inaccuracies. We will ignore all of these which we do not deem to be important here.

One omission which should be pointed out is that Petitioner fails to state that there was no evidence whatever introduced at the trial in the District Court that the permitted uses under the zoning in question would pollute

the aquifer to any extent. (As stated above, Petitioner presented no evidence of any kind at the trial). The Respondent's evidence did show that Respondent's proposed use was in full compliance with the City's own code provisions for the protection of the Edward's Undeground Recharge Zone and other regulations applicable to this aquifer. Although not directly relevant to the issue here this needs to be stated to put the subject matter of the controversy which gave rise to this litigation in perspective.

SUMMARY OF THE ARGUMENT

We will respond to the Petition in three parts: I. "Eastlake;" II. "Procedural Step or a Repeal;" III. "the Tenth Amendment and the Police Power."

These arguments can be summarized as follows:

I. **Eastlake.** That case can be completely distinguished from this case because the constitutional provisions of the States of Ohio and Texas, as well as their statutes and case law, respecting the right of referendum, the powers of home rule cities, and the control of cities over zoning changes are completely different. Both sets of laws are compatible with the U.S. Constitution which neither mandates the use of referendum for zoning purposes nor denies its use.

II. **Procedural Step or a Repeal?** The referendum petitions in question specifically called for the repeal of the zoning ordinance in question. This was the issue submitted to the people and the City Council, in declaring the result, declared the zoning ordinance repealed. Even assuming, arguendo, that the referendum was a mere procedural step and not a repeal, the zoning law of the State would definitely not permit any city to add or subtract from the procedural steps established by State law under Texas law.

III. **The Tenth Amendment and the Police Power.** This amendment to the U.S. Constitution reserves the powers not delegated to the United States "to the States respectively, or to the people." The State of Texas is the repository of the police power not delegated to the United States and in delegating part of this power (such as the power to zone and rezone the use of land) to its subordinate units of government (such as the City of San Antonio) it can by its constitution and general laws regulate and limit the use of such delegated police power.

ARGUMENT

I.
EASTLAKE

Petitioner places overwhelming reliance on the Eastlake case **(City of Eastlake v. Forest City Enterprises,** 426 U.S. 668, 49 L.Ed.2d 132, 96 S.Ct. 2358 [1976]) in spite of the fact that it is utterly distinguishable from this case.

The opinion of this Court in Eastlake makes plain the rationale of that decision in the following words:

> "In framing a state constitution, the people of Ohio specifically reserved the power of referendum to the people of each municipality within the State.
>
> " 'The initiative and referendum are hereby reserved to the people of each municipality on all questions which such municipality may now or hereafter be authoried by law to control by legislative action . . .' Ohio Cons Art II, § lf (1955)." 49 L.Ed.2d at 137.

* * * * * *

"Since the rezoning decision in this case was properly reserved to the people of Eastlake under the Ohio Constitution, the Ohio Supreme Court erred in holding invalid on federal constitutional grounds, the charter amendment permitting the voters to decide whether the zoned use of respondent's property could be altered." 49 L.Ed. 2d at 141.

The Texas Constitution does not provide for the referendum at all. (Neither does the U. S. Constitution).

There is no general law of the State of Texas which authorizes the use of the referendum.

The zoning law of the State of Texas does not authorize the use of the referendum. (See Appendix H Petitioner's brief.)

The constitution of the State of Texas, Home Rule Amendment, Art. XI, Sec. 5, makes home rule city charters and ordinances absolutely subordinate to all general laws of the State. (See Appendix G, Petitioner's brief.)

On the other hand, the constitution and laws of the State of Ohio (a) provide for the use of the referendum; (b) provide that a home rule or charter city may enact valid ordinances which are inconsistent with general laws of the State (with execptions, of course) and (c) that the zoning ordinances of such a city take precedence over the general zoning laws of the State of Ohio.

See "Pages Ohio Revised Code Annotated" as follows:

Ohio Constitution, Appendix:

Art. II, Sec. 1f reads as follows (Apendix, Page's, p. 421):

"§ 1f [Power of municipalities.]

"The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall

be exercised in the manner now or hereafter provided by law. (Adopted September 3, 1912.)"

° ° ° ° ° °

Case Notes 3 and 15 under Art. XVIII, Sec. 7 [Home Rule] (Appendix, Page's, pp. 601, 602) read as follows:

"3. A Charter provision as to city government prevails over inconsistent statutes: Fitzgerald v. Cleveland, 88 OS 338, 103 NE 512, AnnCas 1915B, 106; State ex rel Lentz v. Edwards, 90 OS 305, 107 NE 768 [followed in memorandum opinion, State ex rel Hile v. Baker, 92 OS 506]; Billings v. Cleveland R. Co., 92 OS 478, 111 NE 155; State ex rel Hile v. Baker, 92 OS 506, 112 NE 1086; State ex rel Taylor v. French, 96 OS 172, 117 NE 173; State ex rel Cist v. Cincinnati, 101 OS 354, 129 NE 595; Hile v. Cleveland, 107 OS 144, 141 NE 35."

° ° ° ° ° °

"15. Charter provisions adopted pursuant to Const Art XVIII, § 7, relating to matters of local self-government, including the manner of publication of ordinances, will prevail over conflicting and different provisions of the general laws of the state; 1951 OAG No. 654."

The Case Note No. 1 under XVIII, § 7 in the pocket part of the Appendix (Page's 137-138) reads as follows:

"1. Under the home rule provision of the Ohio constitution the people of a municipality have the absolute right to change the fundamental law of the city provided such changes are not repugnant to the constitution: State ex rel Pecyk v. Greene, 102 App 297, 2 00(2) 322."

The general zoning law of Ohio applicable to cities, such as it is, is to be found in Title 7, "Municipal Corporations," Chapter 713: "Planning Commissions," at page 100 of Page's [Title 7].

Very important is the following statute under Title 7

at page 107 which we copy here together with Case Note 1 thereunder:

> "§ 713.14 Sections do not modify any power granted by law or charter. (GC § 4366-12).
>
> "Sections 713.06 to 713.12, inclusive, of the Revised Code do not repeal, reduce, or modify any power granted by law or charter to any municipal corporation or the legislative authority thereof, or impair or restrict the power of any municipal corporation under Article XVIII of the Ohio Constitution."
>
> ° ° ° ° ° °
>
> "HISTORY: GC § 4366-12; 108 v. PtII 1175 (1177). Eff. 10-1-53."
>
> "CASE NOTES"
>
> "See also case notes 3, 4 under RC § 713.06.
>
> "1. This section yields unrestricted powers to municipalities in respect to zoning if such powers are granted by charter: Bauman v. State ex rel Underwood, 122 OS 269, 171 NE 336.

In the case of **Bauman v. State ex rel Underwood** cited above the Supreme Court of Ohio summed up the situation in **that** State, as follows:

> "Zoning regulations are police or sanitary. Under the provisions of section 3, article XVIII, of the Constitution, municipalities may adopt local police or sanitary regulations if 'not in conflict with general laws.' But the provisions of the Akron charter are not in conflict with state law; for section 4366-12, General Code, yields unrestricted powers to municipalities in respect to zoning, if such powers are granted by the municipal charter."

Under Texas law, on the other hand, it has been held time and time again that the cities of the State must comply with the general zoning law of the state without variation. After all, Arts. 101a-1011j (the zoning law of the state) applies to all cities in the state alike, whether home rule or not.

In **Bolton v. Sparks,** 362 S.W.2d 946, the Texas Supreme Court held invalid a zoning ordinance repeal and zoning amendments where there was full notice and hearing but the official notice was published only 14 days before the council meeting in question and not the 15 days prescribed by statute. See page 949.

The position of the Texas Supreme Court on this point was summarized at page 950 of the opinion as follows:

> "The Courts of this State have held ordinances and amendments to ordinances invalid where the express, mandatory provisions of our zoning statute have not been complied with. The steps directed to be taken for notice and hearing, when provided for in the law, are intended for the protection of the property owner, and are his safeguards against the exercise of arbitrary power. Each act required is essential to the exercise of jurisdiction by the City Council, and each must be rigidly performed. Peters v. Gough, Tex.Civ.App. (1935), 86 S.W.2d 515, no writ hist.; Tonray v. City of Lubbock, Tex.Civ.App. (1951), 242 S.W.2d 816, writ ref., n.r.e."

We could cite an abundance of other cases to the same effect. There is no case law contra.

The point need not be belabored. Ohio is free to permit rezoning by referendum. Other states also permit this, such as California, Colorado and others. Such provisions are not repugnant to the U. S. Constitution. **Eastlake,** supra.

Many other states, however, make no provision for the use of the referendum in this (or other) fields of legislation. Texas is one of these. This also is not repugnant to the U. S. Constitution. There is nothing in the U. S. Con-

stitution or the opinions of the U. S. Supreme Court which would indicate in any degree that the use of the referendum in legislation is constitutionally mandated, either in general or with respect to zoning.

II.

PROCEDURAL STEP OR A REPEAL?

Petitioner (on its pages 9 and 10) tries to draw a distinction between the repeal of a zoning ordinance by referendum and its repeal by the legislative body.

While there is no difference possible under Texas law Petitioner's own official acts in this regard negative its contention that the referendum in question was not a repeal of Respondent's zoning ordinance.

See Appendix H hereto which consists of the minutes of the special meeting of Petitioner's Council on January 19, 1976, (introduced in the trial court as Plantiff's exhibit No. 14) "canvassing the returns and declaring the result of a referendum election held January 17, 1976 . . . ."

The City Council solemnly declared the ordinance to be "repealed" because it was "not approved by a majority of the electors voting thereon."

Indeed, the City Charter referendum provision (Art. IV, Sec. 43) states that a referred ordinance which is not approved "shall thereupon be deemed repealed." See Appendix I, Petition, page 25a.

We do not understand the strained distinction Petitioner seeks to make with this semantic quibbling but we do suggest that it has no right to contend that the zoning ordinance in question was not purportedly repealed by the referendum in question in the teeth of its official declaration to the contrary.

It should be pointed out that the zoning ordinance in question (which was not an amendatory zoning ordinance

but gave Respondent's land its original permanent zoning) had been in full effect for several weeks before the referendum petitions were certified and a repeal therof (as distinct from a mere suspension) was a legal necessity from its standpoint.

Be that as it may, the Texas courts have (in many cases) made it quite plain that cities cannot add or substract procedural steps in zoning, repeal or no.

We cite **Luse v. City of Dallas,** 133 S.W.2d 1079, writ refused (1939) at page 1084, and **Cityof San Antonio v. Lanier,** 542 S.W.2d 232, writ refused, n.r.e. (1976). Also, **Bolton v. Sparks,** supra, 362 S.W.2d 946 at 949, Tex. Sup.Ct. (1962). No proposition in Texas law could be better settled—in zoning law or any other field of law. There was nothing "neutral" about the referendum. Respondent's zoning had already gone into effect. The result of the referendum (as declared by the City Council) was to repeal this zoning and in a manner which completely denied Respondent every safeguard of notice and hearing prescribed for zoning changes, amendments and repeals in the zoning statutes of the State of Texas. See Art. 1011e, V.A.C.S. (set out in Appendix H, page 18a, Petition).

III.

THE TENTH AMENDMENT AND THE POLICE POWER

The Tenth Amendment to the United States Constitution is primarily for the purpose of protecting the sovereignty of the several states. Not only are the "states" referred to first, but, we submit, the "people" referred to are the people of the states and not small groups, such as the citizens of a particular city.

The people of the State of Texas adopted its constitution, adopted the Home Rule Amendment (Art. XI, Sec.

5) and elected the legislators who have prescribed the general law of the State on such subjects as referendums, zoning, etc. Petitioner would subordinate this law and these people (of the State) to the people who participated in the city referendum. This would not only stand the law of Texas on its head but that of the United States. There is no oppresion of the minority by the majority here—all live under the same zoning laws alike.

This Court has recently held that under the Tenth Amendment Congress may not exercise power in a fashion that impairs States' integrity or their ability to function effectively in the federal system. **Fry v. United States** (1975), 421 U.S. 542, 44 L.Ed.2d 363, 95 S.Ct. 1792; **National League of Cities v. Usery,** (1976) 426 U.S. 833, 49 L.Ed2d 245, 96 S.Ct. 2465.

The exercise of the police power, such as zoning regulations, is peculiarly an attribute of state sovereignty. Cities are subdivisions of the state government and are peculiarly subject to the regulations prescribed for the exercise of delegated portions of the police power by the States.

This is well stated in Rathkopf, "The Law of Zoning and Planning," Fourth Edition, Vol. 1, Sec. 2.01 [3], as follows:

> "[3] Police Power of Municipalities
>
> "Municipalities, as such, have no police power. The residual police power reposes in the state and not in any of its political subdivisions. A municipality can only exercise police power when it has specifically or impliedly received a delegation of such power from the state. And it can only exercise such power as has been delegated to the extent, and in the manner, delegated."

Many authorities are cited.

The laws of the State of Texas in this regard (mandatory zoning procedures prescribed by State law and not susceptible of being changed at the local level) do not deprive anyone of life, liberty, property or due process. Indeed, the zoning statutes of Texas are much more considerate of due process and the protection of the individual from the arbitrary and emotional sway of an inflamed majority than would be the case if zoning and rezoning was authorized by referendum.

On page 12 of its Petition the City declares that the "constitutional nexus is the Tenth Amendment, which declares the reservation of power by the people unto themselves, and the instrument of its expression here was the referendum process . . . ." The City has in mind only the people who participated in the referendum in question, or at most the people of the City. Never mind the people of the State of Texas and their Constitution!

In Ohio the people of that state, in adopting a constitution and enacting legislation through its representatives, did authorize the people of Eastlake by charter to control zoning by referendum. The people of Texas have not seen fit to do this. The U. S. Constitution nowhere compels them to do so. Petitioner would subordinate the State of Texas and its people to the City of San Antonio and its people. This would be a perversion of both the republican form of government and of the democratic process.

CONCLUSION

The Respondent submits that a writ of certiorari should not be granted for the following reasons:

1. Petitioner did not raise a Federal question in the State Courts. It certainly did not do so in a timely or proper manner.

2. Petitioner's reliance on the Eastlake case is completely inappropriate because the diametrically opposed

provisions of law applicable in this regard between the states of Texas and Ohio distinguish that case completely from this case.

3. Nothing in the United States Constitution mandates the use of the referendum in zoning matters.

4. Attempted zoning changes or repeals by the City of San Antonio by referendum are completely inconsistent with the controlling provisions of the Texas Constitution (home rule amendment) and laws (zoning statutes.)

5. The effect of the referendum here was to repeal illegally Respondent's zoning without according Respondent the procedure for notice and hearing provided by Articles 1011d and 1011e, Vernon's Annotated Texas Statutes. This was void under Texas law.

Respectfully submitted,

HARVEY L. HARDY
2008 N.W. Military Highway
San Antonio, Texas 78213
Attorney For Respondent,
San Pedro North, LTD.

CERTIFICATE

I, Harvey L. Hardy, a member of the Bar of this Court (admitted February 14, 1949), representing Respondent, San Pedro North, Ltd., do certify that this Opposition to Petition for Writ of Certiorari has been served on the following party herein:

On Petitioner by mailing three copies in a duly addressed envelope to William H. Robison, 501 Milam Building, San Antonio, Texas 78205, of Counsel for Petitioner.

I further certify that all parties required to be served have been served.

HARVEY L. HARDY

APPENDIX A
ORIGINAL ANSWER OF DEFENDANT,
CITY OF SAN ANTONIO

NO. 76CI-667

SAN PEDRO NORTH, LTD.	)(	IN THE DISTRICT COURT
VS.	)(	BEXAR COUNTY, TEXAS
CITY OF SAN ANTONIO, ET AL	)(	45TH JUDICIAL DISTRICT

ORIGINAL ANSWER OF DEFENDANT,
CITY OF SAN ANTONIO
TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the CITY OF SAN ANTONIO, Defendant in the above entitled and numbered cause, and files this its Original Answer to Plaintiff's Original Petition and for such answer would respectfully show the Court the following:

I.

Defendant, the CITY OF SAN ANTONIO, enters this general denial and hereby exercises its legal right to require the Plaintiff to prove by a preponderance of the evidence, if any, all of the allegations which have been made in the Plaintiff's Original Petition, if Plaintiff can so prove and therefore, accordingly generally denies the allegations in Plaintiff's Original Petition and demands strict proof thereof by a preponderance of the evidence as is required by the laws of the State of Texas.

WHEREFORE PREMISES CONSIDERED, Defendant, the CITY OF SAN ANTONIO, prays that Plaintiff take nothing by its suit, and that as to Plaintiff's suit, Defendant, the CITY OF SAN ANTONIO, recover all costs of Court.

WILLIAM H. ROBISON
1545 Milam Building
San Antonio, Texas 78205
Attorney for Defendant,
CITY OF SAN ANTONIO

APPENDIX B
EXCERPT FROM "BRIEF FOR APPELLEE, CITY OF SAN ANTONIO"
Filed April 1, 1977

APPELLEE CITY'S COUNTERPOINTS

COUNTERPOINT NUMBER ONE

The Trial, by its take nothing judgment against Appellant, did not err in holding in effect that the repeal of a zoning ordinance by the result of a duly called and conducted referendum election was proper and authorized by the Home Rule Charter of the City of San Antonio, and was consistent with the Constitution and general laws of the State of Texas.

COUNTERPOINT NUMBER TWO

The Trial Court did not err in holding in effect that considering the City's Charter and Texas zoning laws, a referendum election on a zoning matter was authorized in that zoning matters are not among those subjects specifically excluded from the referendum process by the City Charter, nor has such reservation of power to the people been negated by the Constitution or general laws of the State of Texas.

COUNTERPOINT NUMBER THREE

The Trial Court did not err in holding in effect that the voters, in repealing the zoning ordinance passed by the City Council, did not rezone Appellant's property, but rather returned the prior zoning classification to such property.

COUNTERPOINT NUMBER FOUR

The Trial Court did not err in holding in effect that citizens of the City, voting to repeal a zoning ordinance in

an open election, did so in a reasonable and nondiscriminatory way and that such election and the result thereof related directly to the health, safety and welfare of the City and such action was well supported by evidence before the Court.

APPENDIX C
EXCERPT FROM "MOTION FOR REHEARING BY CITY OF SAN ANTONIO"
Filed February 9, 1978

ASSIGNMENTS OF ERROR UPON WHICH THIS MOTION IS PREDICATED

ASSIGNMENT ONE

THE COURT ERRED IN FAILING TO DISTINGUISH BETWEEN THE PROCESS OF INITIATIVE AND REFERENDUM ACTIONS AS SAME APPLY TO THE SUBJECT OF ZONING.

ASSIGNMENT TWO

THE COURT ERRED IN HOLDING THAT LOCAL MUNICIPAL ZONING MATTERS HAVE BEEN EXCLUDED FROM CITIZENS' REVIEW THROUGH REFERENDUM PROCESS IN THAT SUCH PROCESS IS IN CONFLICT WITH PROCEDURAL ASPECTS OF TEXAS ZONING STATUTES, ARTICLES 1011a THROUGH 1011m, TEX. REV. CIV. STAT. ANN. (1963).

ASSIGNMENT THREE

THE COURT ERRED IN HOLDING THAT CITY CHARTER PROVISION RELATING TO RESERVED POWER OF REFERENDUM IN THE ELECTORS ADDED A PROCEDURAL STEP TO TEXAS ZONING STATUTES, ARTICLES 1011a THROUGH 1011m, TEX. REV. CIV. STAT. ANN. (1963).

ASSIGNMENT FOUR

THE COURT ERRED IN HOLDING THAT A HOME-RULE CITY ELECTION, DULY CALLED AND CONDUCTED IN CONFORMITY WITH CITY CHARTER PROVISIONS RELATING TO CITIZENS' RESERVED RIGHTS TO REFERENDUM PROCESS, WAS VOID AS TO ZONING ORDINANCE.

APPENDIX D

EXCERPT FROM "APPLICATION FOR WRIT OF ERROR ON BEHALF OF CITY OF SAN ANTONIO . . ."

Filed March 29, 1978

POINTS OF ERROR UPON WHICH THIS APPLICATION IS PREDICATED

Point of Error One

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT A HOME RULE CITY ELECTION, DULY CALLED AND CONDUCTED IN CONFORMITY WITH CITY CHARTER PROVISIONS RELATING TO CITIZENS' RESERVED RIGHTS TO REFERENDUM PROCESS, WAS VOID AS TO ZONING ORDINANCE. (GERMANE TO ASSIGNMENT OF ERROR FOUR, PETITIONER'S MOTION FOR REHEARING.)

Point of Error Two

THE COURT OF CIVIL APPEALS ERRED IN FAILING TO DISTINGUISH BETWEEN THE PROCESS OF INITIATIVE AND REFERENDUM ACTIONS AS SAME APPLY TO THE SUBJECT OF ZONING. (GERMANE TO ASSIGNMENT OF ERROR ONE, PETITIONER'S MOTION FOR REHEARING.)

Point of Error Three

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT LOCAL MUNICIPAL ZONING MATTERS HAVE BEEN EXCLUDED FROM CITIZENS' REVIEW THROUGH REFERENDUM PROCESS IN THAT SUCH PROCESS IS IN CONFLICT WITH PROCEDURAL ASPECTS OF TEXAS ZONING STATUTES, ARTICLES 1011a THROUGH 1011m TEX. REV. CIV. STAT. ANN. (1963). (GERMANE TO ASSIGNMENT OF ERROR TWO, PETITIONER'S MOTION FOR REHEARING.)

Point of Error Four

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT CITY CHARTER PROVISION RELATING TO RESERVED POWER OF REFERENDUM IN THE ELECTORS ADDED A PROCEDURAL STEP TO TEXAS ZONING STATUTES, ARTICLE 1011a THROUGH 1011m, TEX. REV. CIV. STAT. ANN. (1963). (GERMANE TO ASSIGNMENT OF ERROR THREE, PETITIONER'S MOTION FOR REHEARING.)

APPENDIX E

EXCERPT FROM "PETITIONER, CITY OF SAN ANTONIO'S, MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR"

Filed June 15, 1978

Point of Error One

This Honorable Court erred in not granting the application for writ of error on Point of Error One which reads as follows:

> THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT A HOME RULE CITY ELECTION, DULY CALLED AND CONDUCTED IN CONFORMITY WITH CITY CHARTER PROVISIONS RELATING TO CITIZENS' RESERVED RIGHTS TO REFERENDUM PROCESS, WAS VOID AS TO ZONING ORDINANCE.

Point of Error Two

This Honorable Court erred in not granting the application for writ of error on Point of Error Two which reads as follows:

> THE COURT OF CIVIL APPEALS ERRED IN FAILING TO DISTINGUISH BETWEEN THE PROCESS OF INITIATIVE AND REFERENDUM ACTIONS AS SAME APPLY TO THE SUBJECT OF ZONING.

Point of Error Three

This Honorable Court erred in not granting the application for writ of error on Point of Error Three which reads as follows:

> THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT LOCAL MUNICIPAL ZONING MATTERS HAVE BEEN EXCLUDED FROM CITIZENS' REVIEW THROUGH REFERENDUM PROCESS IN THAT SUCH PROCESS IS IN CONFLICT WITH PROCEDURAI ASPECTS OF TEXAS ZONING STATUTES, ARTILES 1011a THROUGH 1011m TEX. REV. CIV. STAT. ANN. (1963).

Point of Error Four

This Honorable Court erred in not granting the application for writ of error on Point of Error Four which reads as follows:

> THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT CITY CHARTER PROVISION RELATING TO RESERVED POWER OF REFERENDUM IN THE ELECTORS ADDED A PROCEDURAL STEP TO TEXAS ZONING STATUTES, ARTICLE 1011a THROUGH 1011m, TEX. REV. STAT. ANN. (1963).

APPENDIX F

EXCERPT FROM "PETITIONER, CITY OF SAN ANTONIO'S, MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR

Filed June 15, 1978

If allowed to stand the Court of Civil Appeals' decision that the right of referendum as contained in the Charter of the City of San Antonio is denied by implication in Articles 1011a through 1011m (Tex. Civ. Stat. Ann.), then Petitioner must, on behalf of its citizens, urge that such statutes and the Court's interpretation thereof is violative of such citizens' rights under Amendment Ten of the Constitution of the United States, which states: "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." Further, such statutes and interpretation thereof are violative of the rights of the citizens of San Antonio under the Fourteenth Amendment to the Constitution of the United States which states in part: " * * * No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." Further, such statutes and interpretation thereof are violative of such citizens' rights under the First and Fifth Amendments to the Constitution of the United States insofar as such amendments may apply.

APPENDIX G

RUE 469(e), TEXAS RULES OF CIVIL PROCEDURE

(*e*) *Points of Error.* A statement of the points upon which the application is predicated shall be stated in short form without argument and be separately numbered. In parentheses after each point, reference shall be made to the page of the record where the matter complained of is to be found. Whether the matter complained of originated in the trial court or in the Court of Civil Appeals, it must be assigned as error in the motion for rehearing filed in the latter court.

APPENDIX H

MINUTES

SPECIAL MEETING OF THE CITY COUNCIL OF THE CITY OF SAN ANTONIO HELD IN THE COUNCIL CHAMBER, CITY HALL, ON MONDAY, JANUARY 19, 1976.

The meeting was called to order at 9:00 A.M. by the presiding officer, Mayor Lila Cockrell, with the following members presesnt: PYNDUS, BILLA, CISNEROS, BLACK, HARTMAN, ROHDE, TENIENTE, COCKRELL; Absent: NIELSEN.

76-3 Mayor Cockrell stated that the purpose of the meeting was to canvass the votes of the Special Referendum Election held January 17, 1976.

The members of the City Council then proceeded to canvass the returns of the Election.

After the canvass was complete, the Clerk read the following Ordinance:

AN ORDINANCE 46,247

CANVASSING RETURNS AND DECLARING THE RESULT OF A REFERENDUM ELECTION HELD JANUARY 17, 1976, ON AN ORDINANCE PROVIDING FOR THE ZONING OF CERTAIN PROPERTIES IN THE CITY.

° ° ° °

WHEREAS, Ordinance 45863 passed and approved on October 16, 1975, provided for the zoning of certain properties of the City; and

WHEREAS, prior to the expiration of the period prescribed by Charter, a petition bearing the valid signature of the required number of qualified voters of the City of San Antonio was duly filed requesting that said ordinance be repealed or a referendum election be held on Said Ordinance; and

WHEREAS, the City Council, in response to said petition, by Ordinance 46045 of December 11, 1975, ordered that a referendum election on said ordinance be held on Saturday, January 17, 1976, on said ordinance; and

WHEREAS, said election was duly and legally held on the 17th day of January, 1976, in conformity with the Charter and the election ordinance heretofore passed by the City Council, and the resultof said election has been certified and returned to this Council by the proper officials; and

WHEREAS, this Council has this day considered the returns of said election on the proposition hereinabove stated; and

WHEREAS, said election was in all respects lawfully held and said returns duly and legally made and there were cast at said election the following votes:

January 19, 1976

"Ordinance No. 45863 passed and approved October 16, 1975, providing for the zoning of certain properties in the vicinity of F. M. 1604 and U. S. 281, from 'Temporary R-1' to 'R-1', Single Family Residential District, and 'P-1 (B-2)', Planned Unit Development Business District. FOR THE ORDINANCE."

12,407 votes;

"Ordinance No. 45863 passed and approved October 16, 1975, providing for the zoning of certain properties in the vicinity of F. M. 1604 and U. S. 281, from 'Temporary R-1' to 'R-1', Single Family Residential District, and 'P-1 (B-2)', Planned Unit Development Business District. AGAINST THE ORDINANCE."

44,541 votes;

NOW, THEREFORE:
BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

The referred ordinance (No. 45863) providing for the zoning of certain properties in the vicinity of F. M. 1604 and U. S. 281 was not approved by a majority of the electors voting thereon at the aforementioned referendum election and is, therefore, repealed.

° ° ° ° ° °

After consideration, on motion of Mr. Rohde, seconded by Mr. Pyndus, the Ordinance was passed and approved by the following vote: AYES: Pyndus, Billa, Cisneros, Black, Hartman, Rohde, Teniente, Cockrell; NAYS: None; ABSENT: Nielsen.

The following discussion took place:

MAYOR LILA COCKRELL: I would like to read a memo that I have issued this morning to the Council.

"As an immediate follow-up to the Saturday referendum on the Aquifer zoning case, I am recommending that the City Council request its Planning and Policy Objectives Committee, Chaired by Councilman Glen Hartman, to develop criteria to recommend to City Council for a City request for proposals for a Multi-Disciplinary Research Team. This Team would conduct impartial research into specific areas of concern and advise the City Council on the development of policy affecting the question of development over the Aquifer.

In developing the criteria, the Committee would consult with community leaders for their recommendations as to specific areas of concern and scope of studies which would be covered by the study. In addition, the Planning and Policy Objectives Committee would be requested to furnish the City Council with estimates as to probable costs and length of time the study would require.

January 19, 1976